

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

**ORIGINAL**

In the Matter of )  
)  
Streamlining Broadcast EEO ) MM Docket No. 96-16  
Rule and Policies, Vacating the EEO )  
Forfeiture Statement )  
and Amending Section 1.80 of )  
the Commission's Rules to Include )  
EEO Forfeiture Guidelines )

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**COMMENTS OF THE  
NATIONAL ASSOCIATION OF BROADCASTERS**

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## EXECUTIVE SUMMARY

The broadcasting industry remains committed to equal employment opportunities for women and minorities. The Commission's 1995 broadcast employment report demonstrates that broadcasters are continuing to hire more women and minorities, and in positions of responsibility. Moreover, broadcaster associations have stepped up their efforts to provide stations with additional methods for recruiting women and minorities.

The National Association of Broadcasters supports most of the concepts presented in the *Notice of Proposed Rulemaking*. Raising the threshold for reporting requirements will provide much paperwork relief to many stations, while having little affect on the Commission's EEO mission. If the threshold is raised to those with 20 or more employees, the burden would be lifted from 4,616 stations currently subject to reporting, while affecting only 23.7 percent of employees at stations subject to reporting. Raising the limit on requiring a written EEO program for minorities would also aid stations with little minority representation in their local labor force. We recommend raising the threshold to ten percent.

In addition, we support the Commission's proposals to give greater credit to those broadcasters who participate in joint recruiting efforts and to allow broadcasters the option of using alternative labor force data for comparing their staff profiles. Moreover, we recommend that the Commission not scrutinize the EEO efforts of small market broadcasters (i.e., those outside Metropolitan Statistical Areas or inside MSAs of 100,000 or less) who have no history of past discrimination.

On the other hand, NAB believes that the system of finding violations and assessing forfeitures proposed by the Commission is too focused on the recruitment process, with little recognition of success in hiring women and minorities. Broadcasters have little certainty that the steps they are taking to recruit women and minorities will be viewed by the Commission

as “taking all reasonable steps” to comply with the EEO rules. Because the goal of any affirmative action program — including the Commission’s — is increased hiring of women and minorities, NAB urges the Commission to adopt a program that gives due consideration to a station’s employment profile.

We recommend that the Commission adopt a sliding scale approach to EEO analysis whenever there is a petition to deny. Our approach is based on a station’s relationship to parity in its labor force:

- If a station is at less than 70 percent of parity in a given year, the station can show compliance by following its written program for all but “emergency” hires, and either expanding its use of minority-oriented recruitment sources or participating in at least four other minority-oriented outreach activities, such as job fairs, internship programs, etc., during the next 12 months.
- If a station is between 70 and 90 percent of parity in a given year, the station can show compliance by following its written program for all but “emergency” hires, and either expanding its use of minority-oriented recruitment sources or participating at least twice in other minority-oriented outreach activities during the next 12 months.
- If a station is at 90 percent of parity or higher in a given year, the station can show compliance by following its written program for all but “emergency” hires.

Our approach (which can be used in tandem with the Commission’s processing guidelines) lends certainty to the process by allowing broadcasters to know in advance what they expected to do during the coming year to achieve compliance. It also provides Commission staff with certainty in analyzing broadcasters’ efforts. And it incorporates broadcasters’ EEO success into the process, while alleviating the need for much of the paperwork associated with the Commission’s proposal. NAB urges the Commission to adopt our approach.

Finally, NAB recommends that the Commission reexamine its EEO regime in light of the recent decision in *Hopwood v. Texas*.

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**I. INTRODUCTION**

The Commission is seeking comment on several proposals for streamlining its EEO procedures and a proposed amendment to its EEO forfeiture guidelines.<sup>1</sup> Among the proposals presented by the Commission are:

- Adopting a set of guidelines for finding violations and assessing forfeitures, similar to the guidelines contained in the 1994 EEO *Policy Statement*.<sup>2</sup>
- Raising to ten full-time employees the threshold for maintaining a written EEO program.
- Adopting relief based on the station's market size.
- Encouraging the use of broadcasters' joint recruitment efforts by giving significant credit to broadcasters employing such methods.
- Allowing broadcasters to rely upon alternative labor force data in comparing a station's staffing to available labor force.

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<sup>1</sup> *Order and Notice of Proposed Rule Making* in MM Docket No. 96-16, 11 FCC Rcd. 5154 (1996).

<sup>2</sup> 9 FCC Rcd. 929 (1994).

The National Association of Broadcasters ("NAB")<sup>3</sup> is pleased that the Commission has decided to move forward in this area. NAB last year had urged the Commission to expedite its long-dormant Inquiry into possible changes to its EEO rules.<sup>4</sup> Broadcasters have for too long lived with tremendous uncertainty regarding the adequacy of their EEO programs, in light of the Commission's heightened emphasis on broadcasters' efforts to attract female and minority applicants when reviewing licensees' EEO programs at renewal time.<sup>5</sup>

NAB has long promoted the goal of equal employment opportunity in the broadcasting industry. For two decades NAB's Department of Human Resource Development has been a vehicle to assist broadcasters in recruiting women and minorities. In addition, the NAB Legal Department has provided NAB members with information to assist them in complying with the FCC's EEO regulations. Our concerns with the FCC's policies in this area have been about fairness. While measuring broadcasters' EEO results based on a quota system is unworkable (and, now, unlawful), we are also troubled that the Commission's current efforts-based system of review makes results a secondary consideration. We believe that success should count at least as much as the efforts needed to achieve that success. To that end, NAB last year held a series of meetings with staff from the Minority Media and Telecommunications Council, in an effort to reach consensus on a more equitable program. While those meetings did not result in any specific proposals, they were productive and informative.

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<sup>3</sup> NAB is a nonprofit, incorporated trade association which serves and represents America's radio and television stations and networks.

<sup>4</sup> Letter to Roy Stewart, Chief, Mass Media Bureau, September 15, 1995. We note that any changes to the EEO rules can effect only radio stations, since the Commission is statutorily prohibited from changing application of the rules for television. See 47 U.S.C. § 334.

<sup>5</sup> *Report and Order* in MM Docket No. 85-350, 2 FCC Rcd. 3967 (1987).

Regarding this proceeding, NAB is encouraged that many of the proposals contemplated in the *Notice* would relieve many licensees from unnecessary burdens concerning their EEO programs. For example, we agree with the Commission that small broadcasters and those in areas with few minorities should be provided some relief from the onerous recordkeeping burden imposed by the Commission's current enforcement stance. And we are encouraged that the Commission is willing to give broadcasters more credit for the use of joint recruitment efforts with other broadcasters and the use of certain types of job banks operated by state broadcaster associations. These proposals, and several others discussed *infra*, will help provide broadcasters with much-needed relief from the often-oppressive processing and recordkeeping associated with the Commission's current efforts-based EEO enforcement policy.

We are nonetheless disheartened that the Commission is proposing to keep intact the method of finding violations and assessing forfeitures that was set forth in the 1994 *Policy Statement*. That forfeiture scheme is much too concerned with the process of recruitment, providing little recognition for those stations that have achieved, or nearly achieved, the goal of any affirmative action program, including the Commission's — the hiring of women and minorities. Instead, the proposed forfeiture scheme merely makes a mitigating factor of the actual hiring of women and minorities at or near parity with their presence in a station's labor force, even though the station may have achieved 100 percent of parity or more.

Instead of the proposed forfeiture guidelines contained in the *Notice*, NAB recommends that the Commission adopt a sliding scale approach to examining broadcasters' EEO efforts in response to a petition to deny. As explained *infra*, the amount of effort and types of records that a broadcaster would be required to produce in a given year should depend on the level of parity demonstrated by the station's Annual Employment Report for that year. The better

the station's performance vis-a-vis its labor force, the less that should be required of the station to pass muster. A violation would not be determined merely by the station's inability to produce records, but by its failure to conduct those activities associated with its hiring level. Such a system would give broadcasters and Commission staff more certainty in the assessment of EEO programs, while lending more balance to consideration of a licensee's EEO efforts and its results.

## II. THE COMMISSION SHOULD REEXAMINE ITS *ADARAND* ANALYSIS

The validity of the Commission's EEO regulations, as well as all government-mandated affirmative action programs, became suspect after the Supreme Court decision in *Adarand Constructors v. Peña*,<sup>6</sup> which held that race-based programs must be examined under a strict scrutiny standard. In examining its EEO regulations in light of *Adarand*, the Commission has determined that, because its regulations involve outreach and recruitment but do not require licensees to employ anyone on the basis of race, *Adarand* does not apply to the FCC's EEO rules. The *Notice* seeks comment on this analysis.

NAB is not altogether in agreement with the Commission. For its determination, the Commission relies primarily on a passage in the June 1995 Justice Department memorandum from Assistant Attorney General Walter Dellinger ("Dellinger Memorandum"). The Dellinger Memorandum stated that, in general, outreach and recruitment programs designed to expand the pool of applicants without using race or ethnicity in the actual decisionmaking would not be subject to strict scrutiny. However, the Dellinger Memorandum contained the following caveat:

Outreach and recruitment efforts conceivably could be viewed as race-based decisionmaking of the type subject to *Adarand* if such efforts work to create a 'minorities-only' pool of applicants or bidders, or if they are so focused on

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<sup>6</sup> 115 S.Ct. 2097 (1995).



minorities that nonminorities are placed at a significant competitive disadvantage with respect to access to contracts, grants or jobs.<sup>7</sup>

In theory, the Commission's EEO requirements seem to be innocent enough. In practice, however, they often stray into murky waters. One troublesome aspect is the Commission's requirement that licensees not only assess the nature of their applicant pools, but also their *interviewee* pools.<sup>8</sup> While assessment of applicant pools may occur after the hiring process is completed, the only time for "meaningful" assessment of interviewee pools is during the hiring process itself. In order for the interviewee pool to be assessed, someone — presumably the EEO Officer — must examine the race and gender characteristics of the pool. (Of course, at most stations the EEO Officer is often the general manager, who also does the hiring.) If the nature of the pool is deemed to be "inadequate," the interviewee pool would then have to be expanded to include an "adequate" number of women and minorities. This treads dangerously close to placing an interviewee at a competitive disadvantage because of race or gender. It also places the licensee in jeopardy of a discrimination, or even a reverse discrimination, lawsuit, under Title VII of the Civil Rights Act or state law.<sup>9</sup>

This emphasis on the interviewee pools is particularly disturbing when combined with the Commission's requirement — developed through case law, not rulemaking — that

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<sup>7</sup> Dellinger Memorandum at 7-8, n.13.

<sup>8</sup> See Notice, *supra* note 1, ¶ 43.

<sup>9</sup> Reverse discrimination complaints have been filed against some licensees recently, and at least one has involved court litigation. See *Davis v. Independent Broadcasting Co., Inc.*, No. 95-3004-CV-S-4 (W.D. Mo. filed Jan. 4, 1995). That case reportedly has been settled.

licensees' recruitment efforts be targeted toward the "dominant"<sup>10</sup> minority group or "significant" minority groups<sup>11</sup> in the labor force. The intrusion into whether a licensee may *interview* a member of a particular minority group goes beyond the mere efforts to recruit so as to attract applicants. For example, in *Tri-Valley Broadcasters*, the Commission expressed its concern that the licensee did not interview a black during any of the mere 12 hiring opportunities the station had during the three-year inquiry period. By seeking to ensure that interview pools meet certain demographic requirements, the Commission again strays into the area of placing individuals at a competitive disadvantage based on race. The Commission should examine this practice in light of *Adarand*.

Moreover, the Commission should reexamine its EEO mission in light of the recent decision in *Hopwood v. Texas*,<sup>12</sup> which struck down a University of Texas Law School practice that set a lower standard of admission for blacks and Mexican-Americans as a means of promoting diversity of viewpoint in the school. There, the court noted that viewpoint diversity, when used as a catalyst for preferential treatment based on race, may often proliferate the stereotypes that diversity is meant to eliminate:

The assumption is that a certain individual possesses characteristics by virtue of being a member of a certain racial group. This assumption, however,

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<sup>10</sup> *KRMD, Inc.*, 53 F.C.C.2d 1179, 1187 (1975). The term "dominant" itself has become something of a misnomer. In *KRMD* the population of the station's MSA was 33.2% minority, with the Black population accounting for nearly all the minority population. Yet, recently in *Tri-Valley Broadcasters*, 11 FCC Rcd. 4719 (1996), the Commission considered black to be the "dominant" minority, even though it comprised only about 40% of the minority population (the MSA is 12.5% Black, 9.5% Hispanic, 6.6% Asian/Pacific Islander and 0.6% American Indian).

<sup>11</sup> The Commission, through caselaw, has extended this requirement to include "significant" minority groups. See *Texas Coast Broadcasters*, 11 FCC Rcd. 1688 (1996) ("It does not appear that the licensee in this case consistently engaged in sufficient efforts to attract Hispanics — one of the most significant minority groups in the Houston, TX, MSA ..." Houston MSA was 31.7% minority — 16.9% Black; 12.6% Hispanic; 1.9% Asian/Pacific Islander; 0.3% American Indian).

<sup>12</sup> 78 F.3d 932 (5th Cir. 1996), *cert. den.* July 1, 1996.

does not withstand scrutiny. “[T]he use of a racial characteristic to establish a presumption that the individual also possesses other, and socially relevant, characteristics, exemplifies, encourages, and legitimizes the mode of thought and behavior that underlies most prejudice and bigotry in modern America.”

To believe that a person’s race controls his point of view is to stereotype him.<sup>13</sup>

Since *Hopwood*, diversity in programming may no longer be an adequate justification for the Commission’s involvement in EEO. NAB recommends that the Commission examine the impact of *Hopwood* on its EEO rules.

### **III. THE EMPLOYMENT OF WOMEN AND MINORITIES IN THE BROADCASTING INDUSTRY CONTINUES TO BE STRONG.**

Two years ago in Comments filed in the *Notice of Inquiry* concerning the Commission’s EEO rules,<sup>14</sup> NAB noted the advances made by the broadcasting industry in employing women and minorities in key positions. At that time, the percentage of women and minorities hired by stations had *increased*, while overall employment in broadcasting had *decreased* substantially during the period from 1988 to 1992. Hiring of minorities in the industry was at just over 80 percent of parity overall and 71 percent in the upper four job categories. For women, the industry was at 87 percent of parity overall and 72 percent in the upper four categories.

The broadcasting industry remains committed to equal employment opportunity, as evidenced by the continued increase in the hiring of minorities and women. According to the

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<sup>13</sup> *Id.* at 946 (citing Richard A. Posner, the DeFunis Case and the Constitutionality of Preferential Treatment of Minorities, 1974 Sup. Ct. Rev. 12 (1974)).

<sup>14</sup> See Comments of NAB in MM Docket No. 94-34, filed June 13, 1994, at 2-4.

Commission's 1995 employment report,<sup>15</sup> minority employment in the industry jumped 1.3 percent from 1994 (to 19.7 percent), while employment of women rose 0.8 percent (to 40.7 percent). During the same period minority employment in the national labor force increased only 0.3 percent (from 24.3 to 24.6), while female employment was up a modest 0.1 percent (from 45.9 to 46.0).<sup>16</sup> In minority employment, the industry is at just over 80 percent of parity overall and 71 percent in the upper four categories. For employment of women, the industry is at 88 percent of parity overall and 74 percent in the upper four categories.

In terms of actual jobs, broadcasters' EEO commitment is more apparent. In 1995, there were 5,608 more upper four category jobs in the industry than in 1994. Minority-held upper four jobs increased by 2,678, which accounts for 48 percent of the overall increase. Upper four jobs held by women increased by 3,340, which represents nearly 60 percent of the overall increase. Thus, broadcasters continue to make tremendous strides in hiring women and minorities in positions of responsibility.

Furthermore, the industry is dedicated to providing opportunities for broadcasters to reach out to women and minorities, thereby presenting positive career options for them. The Employment Clearinghouse ("ECH") of the NAB Department of Human Resource Development ("HRD") is central to this effort

ECH is a national free resume referral service. Job seekers and broadcasters in search of qualified and qualifiable personnel are brought together through the service. The job experience of persons registered with ECH range from entry-level to management. Minorities

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<sup>15</sup> *Public Notice, 1995 Broadcast and Cable Employment Report*, released June 12, 1996.

<sup>16</sup> Compare *id.* with *Public Notice, 1994 Broadcast and Cable Employment Report*, released June 2, 1995.

and women are especially encouraged to register. Counseling is also available for prospective broadcast employees and current station employees seeking assistance in career planning. Approximately 3,000 resumes are in ECH's data files, and computer listings are also maintained in some 26 categories of industry jobs. Broadcasters may also call the Clearinghouse for personalized service in finding job candidates.

Resumes are received by mail from applicants or through contacts with ECH staff at conventions and conferences. Applicants and other interested persons may check on daily job listings through the "ECH Jobline," a non-toll telephone service. ECH information is also available within the NAB's Home Page found on the Internet. Over the past 20 years, nearly 1,000 known broadcast job placements have been made through the Employment Clearinghouse.

To help facilitate broadcaster-minority job seeker connections, HRD conducts many initiatives and creates useful publications. Since January 1996, a major broadcast career fair was held in cooperation with the Broadcast Education Association during the annual NAB Spring convention in Las Vegas. Thirty-four exhibitors, including state associations, and radio and television groups, promoted job opportunities to 450 students and professionals from across the nation. Plans are now underway to replicate the success of this career fair at the Los Angeles Convention Center just prior to The NAB Radio Show in October of this year.

Minority Resource panels presented as part of NAB Radio License Renewal Seminars represent a unique HRD effort at identifying local resource persons to assist broadcasters in fulfilling their EEO obligations. Since 1994, minority resource panels have been a part of 18 such seminars serving broadcasters located in 40 states.

Another HRD program for broadcasters and women and minority job-seekers is the Regional Broadcast Career Fair conducted with state associations. The first Regional Career

Fair was conducted with the Wisconsin Broadcasters Association on April 27, 1996, in Milwaukee, where 57 broadcast exhibitors and 125 job-seekers participated. Two more Regional Career Fairs are planned in conjunction with state associations in 1996, and another is planned in January of 1997.

During these and other activities focused on attracting women and minorities to the industry, HRD will distribute a newly developed career information flyer, "Linking You To Employment Opportunities In Broadcasting."

In addition, state broadcaster associations are extensively involved in such activities as employment clearinghouses and job fairs. NAB and the Broadcast Executive Directors Association have surveyed state associations to ascertain their programs designed to further employment of women and minorities in the industry. The results of that survey are attached to these Comments. It shows that in at least 33 states the broadcasting industry has a vehicle to attract women and minorities to a broadcasting career. This is merely a sampling of the EEO ventures initiated by broadcasters. Numerous marketwide broadcaster associations also conduct similar activities as a means of bringing women and minorities into broadcasting.

Broadcasters' commitment to EEO is very apparent. Yet, despite this commitment, the Commission continues to require all broadcasters — regardless of the results of their outreach programs — to maintain detailed records on the sources used for each job opening, the number, race and gender of applicants, the sources that referred each applicant to the station, and the number, race and gender of interviewees. This paperwork is meant to demonstrate the licensee's compliance with the Commission's EEO regulations. Often overlooked by the Commission, however, is the purpose of the regulations — to foster employment in the broadcasting industry.

**IV. THE COMMISSION'S EFFORTS-BASED EEO ENFORCEMENT MECHANISM GIVES BROADCASTERS LITTLE GUIDANCE FOR COMPLIANCE AND IS OFTEN COUNTERPRODUCTIVE.**

One of the major problems surrounding compliance with the Commission's EEO rules is vagueness. The Commission expects broadcasters to contact statewide, regional or even national minority and women's organizations in an effort to attain the goal of approaching parity with the *local* labor force. Thus, broadcasters can never be certain that the Commission will believe they have taken all reasonable steps to attract women and minorities. Moreover, because the Commission has never defined the term "adequate," broadcasters can never be certain that they have an "adequate" number of female and minority applicants in their applicant pools.

In this regard, NAB notes that Section 212 of the Contract with America Advancement Act of 1996<sup>17</sup> requires agencies to publish "small entity compliance guides" as a means to assist small entities in complying with rules. Such guides must use "sufficiently plain language likely to be understood by affected small entities." NAB recommends that the compliance guide for the Commission's EEO rules provide detail concerning the steps licensees are expected to take to ensure compliance, how licensees can determine the adequacy of applicant pools, and other aspects of EEO compliance.

The Commission's EEO enforcement program is often counterproductive in that it many times causes licensees to needlessly delay the employment process. Licensees often are hesitant to hire or promote qualified individuals — including women and minorities — who may be available immediately, simply because the Commission places so much reliance on licensees'

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<sup>17</sup> Pub. L. No. 104-121, 110 Stat. 847.

recruitment efforts. As noted by KXKZ-FM in its comments to the Commission's EEO *Notice of Inquiry*:

One of the tragedies of our situation is that we have had qualified people ... looking for a job ... walk in our doors and apply for a job when we had a crisis opening ... but we dared not hire them until we had gone through our entire EEO process. By the time we go through the process ... this person is gone ... obtained a job in another market and not available to us ... even though ... among the applicants we had we did not have a single person we felt we should hire. Yet, this person who NEEDED a job ... WANTED to work here ... and we needed desperately ... has gotten a job elsewhere. We did not hire him or her when they were available ... even though they were exactly what we were looking for ...<sup>18</sup>

Even when the station is able to hire the individual, the needless delay caused by the need to adhere to the Commission's efforts-based EEO policy can take its toll on station staff and resources:

We just had a situation in the traffic department of our station recently which points out that problem. A white female resigned, leaving two other employees in the department trying to keep up with the demands of the job by themselves. A qualified black female was available and all of those involved in the hiring process wanted to hire her right away to ease the burden. However, the insure that we followed 'proper' procedures, we notified all our sources and waited two long weeks for referrals to contact us and to give us time to document all of our actions. In the meantime, overtime was spent, the two remaining traffic employees suffered frayed nerves, mistakes were made and nothing was gained. Just today, we decided to offer the job to the black female we would have been better off hiring initially. The process was counter-productive.<sup>19</sup>

By delaying the hiring process, licensees run the risk of losing the opportunity to hire qualified individuals. If the licensee eventually hires the individual, it has needlessly expended station resources. This is the type of "lose-lose" situation perpetuated by the Commission's current efforts-based regime.

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<sup>18</sup> Comments of KXKZ in MM Docket No. 94-34, filed June 13, 1994, at 3 (ellipses and emphasis in original).

<sup>19</sup> Comments of WOWK-TV in MM Docket No. 94-34, filed May 19, 1994, at 2.



Another failing of efforts-based enforcement is the need to gather race and gender information from applicants. The Commission's EEO regulations require broadcasters to periodically self-assess their EEO programs, by analyzing applicant and interview pools to determine whether they contain "adequate" numbers of women and minorities and by determining the number of minority and female referrals obtained from each recruitment source. This involves gathering data on race and gender, which requires that the data be collected and maintained separate from the job application, by use of a "tear-off" sheet.

Unfortunately, applicants cannot be forced to provide the data — their participation is strictly voluntary. As a result, many stations have found that a large percentage of applicants are unwilling to provide the data, making the data collected often sorely incomplete. Resumes themselves are often useless as a means to obtain the needed information, because many resumes are devoid of references to groups or activities that may indicate the individual's race. Thus, it is quite likely that many licensees actually have more minorities in their applicant pools than even detailed recordkeeping can account for.

## **V. RECORDKEEPING SHOULD BE BASED ON RESULTS.**

Change in the Commission's approach to EEO enforcement definitely is needed. The Commission must develop a regulatory regime which gives recognition to broadcasters' success in recruiting women and minorities. The Commission should give substantial deference to a broadcaster whose employment profile approaches parity with its labor force. After all, a broadcaster who is near parity in the employment of women and minorities is obviously achieving the goal of any affirmative action program, i.e., the employment of women and

minorities. How that station accomplishes this goal should be of little consequence to the Commission.

NAB, therefore, urges the Commission to adopt a tiered approach to the types of recruitment and recordkeeping that a licensee must demonstrate in order to meet an EEO-based challenge at renewal. We recommend that:

1. If a station is at less than 70 percent of parity in a given year, the station can show compliance by following its written program for all but "emergency" hires, and either expanding its use of minority-oriented recruitment sources or participating in at least four other minority-oriented outreach activities, such as job fairs, internship programs, etc., during the next 12 months.
2. If a station is between 70 and 90 percent of parity in a given year, the station can show compliance by following its written program for all but "emergency" hires, and either expanding its use of minority-oriented recruitment sources or participating at least twice in other minority-oriented outreach activities during the next 12 months.
3. If a station is at 90 percent of parity or higher in a given year, the station can show compliance by following its written program for all but "emergency" hires.

This regime would provide the Commission and broadcasters with a high degree of certainty as to the kind of recruitment efforts expected by a station during a given year, while eliminating most of the massive recordkeeping now required by the Commission. Because the staff profile for filing the Annual Employment Report is taken during the first quarter of each year, the licensee would be aware of its obligation early enough to take substantive corrective actions. By way of demonstration, suppose a station uses a pay period in March as the basis for its Employment Report, and its staff profile for 1996 shows the station to be at less than 70 percent of parity. The station would know in March the types of activities it would need to conduct during 1996 to be in compliance for that year. If in 1997 the staff profile showed the station to be between 70 percent and 90 percent of parity, the licensee would then know the types

of activities it would need to conduct during 1997 to be in compliance for that year. The Commission, too, would know the types of activities the station would be expected to conduct, and could find a violation if the station fails to conduct the activities.

NAB believes this is an equitable alternative to the proposed guidelines for assessing forfeitures. The proposal presented in the *Notice* requires detailed recordkeeping by all stations, regardless of their employment profile. Thus, increased employment of minorities at a station merely becomes a mitigating factor, one which reduces the potential forfeiture by only one-half the base fine. In addition, stations and the Commission are often unsure about how extensive (locally, statewide, regionally or nationally) a station's recruitment efforts must be in order to be reasonable. Thus, expansion of recruitment sources often becomes a never-ending process, with no certainty of success, but with the guarantee that stations must generate more paperwork<sup>20</sup> and incur more expense.<sup>21</sup>

Moreover, the Commission's EEO regulations require broadcasters to strive for equal employment opportunity on five fronts: (1) disseminate EEO programs to job applicants and employees; (2) use potential sources of minority and female applicants to supply referrals whenever job vacancies occur; (3) evaluate station employment profile and job turnover against the availability of minorities and women in the recruitment area; (4) undertake to promote qualified minorities and women to positions of greater responsibility in a nondiscriminatory fashion; and (5) analyze efforts to recruit, hire and promote minorities and women and address

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<sup>20</sup> In this regard, Sunbrook Communications has provided an excellent example of the frustration faced by many small market broadcasters in meeting the Commission's current requirements. Comments of Sunbrook Communications, filed April 5, 1996, at 2-4.

<sup>21</sup> KLGT-TV in St. Paul, Minnesota, reports spending up to \$1,000 per position for newspaper ads alone. Comments of Miles Kennedy, Vice President/Controller, filed May 6, 1996.

difficulties encountered in implementing the EEO program.<sup>22</sup> Unfortunately, the proposed “guidelines” contained in the *Notice* address merely two of those areas — use of sources and analysis of efforts. Almost totally ignored are two key elements of the EEO program: the station’s employment profile and promotion of women and minorities. Our proposal would make them more integral parts of the evaluation of a licensee’s overall EEO performance.

In addition to certainty, our proposal would recognize successful recruitment programs as more than just a mitigating factor for assessing fines. Commission staff have often stated that the Commission focuses on recruitment efforts because efforts lead to applicants, applicants lead to interviews, and interviews lead to hires. A station that is employing minorities at over 90 percent of parity should be given the benefit of the doubt, because its recruitment is producing results.

In adopting this proposal, the Commission should also reassert its “zone of reasonableness” policy, whereby a licensee whose staff profile is below the 70 percent threshold would be given the benefit of the doubt if the absence of one or two minorities would make a significant difference in the percentages. For example, a station with 20 employees in an area where minorities comprise ten percent of the labor force would need two minorities on staff to achieve parity. If the station had one minority on staff, it would be at 50 percent of parity and would be required to expand its sources or participate in four minority-oriented recruitment activities during the coming year. Yet, it would be impossible for such a station to be in the 70 to 90 percent of parity range, because it would have to hire a fraction of a person. In such an

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<sup>22</sup> 47 C.F.R. § 73.2080(c).

instance, the Commission should allow the station to either expand its sources or participate in two minority-oriented recruitment activities in order to demonstrate compliance.

We note that our proposal is not intended to replace the Commission's current EEO processing guidelines, the so-called 50 percent of parity tests. Rather, our proposal — like the proposal contained in the *Notice* — can work in tandem with the processing guidelines. The processing guidelines can still provide a benchmark for initial review at renewal, creating a presumption of compliance. Our proposal would then serve as a means for further Commission examination of the EEO efforts of a licensee that is the subject of an EEO-based petition to deny.

## **VI. THE COMMISSION SHOULD ENCOURAGE BROADCASTERS TO PARTICIPATE IN JOINT RECRUITMENT EFFORTS.**

Even if the Commission continues with its current enforcement mechanism, it should encourage broadcasters to participate in joint recruitment activities. Such activities as job fairs and employment clearinghouses are cost-efficient means for licensees to reach out to women and minorities. A station's presence at a job fair, for example, is an excellent way for potential applicants to identify the station as a potential employer, even if the station might not have an opening at the time of the fair.

Yet, these activities are often given short shrift by the Commission when evaluating a licensee's EEO efforts. Job fairs may occur when there may be no actual hiring opportunity at the station, and therefore anyone who approaches the station at a job fair usually cannot be considered an "applicant" when a hiring opportunity occurs. In addition, the Commission has often treated employment clearinghouses — even those operated by elements of the broadcasting industry — as "general" sources, which invariably are looked upon as less

preferable to minority-specific sources.<sup>23</sup> Yet, industry-operated clearinghouses, while not exclusively serving minorities or women, are often geared toward their introduction into positions in the industry that require special talents or skills. Moreover, because these clearinghouses specialize in finding employment for people who are interested in the broadcasting industry, they generally may be more useful sources than minority or female specific organizations whose membership have little interest in becoming broadcasters.<sup>24</sup>

Therefore, NAB urges the Commission to recognize that use of broadcaster-sponsored clearinghouses or participation in activities such as job fairs and minority or female internship programs are integral parts of broadcasters' outreach to women and minorities. Participation in such activities should be included as evidence that a licensee is doing all it can to reach out to women and minorities.

## **VII. BROADCASTERS SHOULD BE ALLOWED GREATER FLEXIBILITY IN THE USE OF LABOR FORCE DATA.**

The Commission's EEO regime also is flawed in its use of general labor force data instead of *qualified* labor force data. The Commission has repeatedly assured broadcasters that it does not expect them to hire anyone who is not qualified. Yet, when comparing a station's employment profile to that of its relevant labor force, the comparison is always to the general labor force. The skill levels of the labor force in the broadcaster's market are totally ignored.

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<sup>23</sup> See *Midland Broadcasters, Inc. (KAMJ(AM)/KMAJ-FM)*, *Omaha Great Empire Broadcasting, Inc. (WOW(AM)/WOW-FM)*, *Stauffer Communications, Inc. (WIBW(AM)/WIBW-FM)*, 9 FCC Rcd. 2091 (1994), at 2093 n.6.

<sup>24</sup> A common complaint received by NAB at its license renewal seminars and elsewhere is that many minority organizations are not geared toward acting as a referral service. Sending job openings to these organizations may often be a waste of effort on the part of broadcasters. Yet, the Commission expects — and, indeed, requires — broadcasters to contact such organizations for every job opening.

This leads to the incongruous result — especially for small broadcasters — that stations' employment profiles generally must be more skilled than the labor pool from which they are drawn.<sup>25</sup> NAB believes that, out of fairness, the Commission should compare licensees' employment profiles with the presence of workers with the requisite skills for specific broadcast positions in the local labor forces.

NAB agrees with the Commission's proposal to allow stations greater flexibility in the use of alternative labor force data. MSAs have expanded, some greatly, during the 1990s. For example, the Washington, D.C., PMSA (part of the larger Washington-Baltimore Consolidated Metropolitan Statistical Area) now extends to Frederick County, Maryland, Berkeley and Jefferson Counties in West Virginia, and Frederick, Warren, Culpeper and Spotsylvania Counties in Virginia. While some residents in these areas may commute into the District, it is highly unlikely that many commute from the District to these areas. Moreover, the primary coverage areas of stations in these counties would likely fall well short of the District, due to distance and terrain.<sup>26</sup> To require these stations to use MSA-wide data would be unrealistic and unfair.

NAB believes that stations — at their option — should be allowed to use data from the county or counties that comprise their primary coverage area (0.5 mV/m for AM; 1 mV/m for FM; Grade B for TV) in assessing their EEO programs.<sup>27</sup> After all, programming is the nexus for the Commission's involvement in EEO in the first place — the EEO rules are

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<sup>25</sup> See Comments of Nebraska Rural Radio Association, filed June 28, 1996, at 7-10.

<sup>26</sup> Similar situations are described in Comments of KHWY-FM, filed May 15, 1996, and Comments of Virginia Broadcasting Corporation, filed April 30, 1996, at 4.

<sup>27</sup> The Commission has available not only MSA data, but also county-by-county data.

intended to ensure that licensees employ women and minorities so that the station's programming is reflective of the needs and concerns of women and minorities in the station's coverage area.<sup>28</sup> Requiring stations to meet a higher, often unattainable, standard unduly burdens them. Allowing stations to focus on the gender and race demographics within their coverage area is the logical choice.

#### **VIII. RAISING THE THRESHOLDS FOR EEO RECORDKEEPING WOULD PROVIDE MUCH-NEEDED RELIEF FOR MANY STATIONS WITHOUT DECREASING THE EFFECTIVENESS OF THE COMMISSION'S RULES.**

The Commission has proposed raising the reporting thresholds concerning the number of full-time employees at a station and the percentage of minorities in the station's labor force. Specifically, the Commission seeks comment on whether it should raise the threshold for filing entire Annual Employment Reports and EEO Program Reports from the current five to possibly ten or 15 employees. In addition, the Commission seeks comment on whether the threshold for maintaining a written EEO Program for minorities be raised to ten percent aggregate minorities in the station's labor force, from the current five percent.

NAB favors raising both thresholds as a means of reducing paperwork for small broadcasters and those in areas with low minority populations. These stations often have great difficulty in recruiting and retaining employees — including minorities — since they generally cannot offer benefit packages as attractive as larger corporations can. And, although the reporting burden would be lifted, the stations involved could still be subject to the Commission's EEO rules. Thus, the Commission would not sacrifice any important advances on the EEO front.

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<sup>28</sup> See *Florida State Conference of Branches of the NAACP v. FCC*, 24 F.3d 271, 272 (D.C. Cir. 1994).



**A. There Is Ample Record Justification for Raising the Employee-Based Reporting Threshold.**

In the *Notice*, the Commission provides data concerning the number of stations and employees that would be affected by raising the threshold to 15 employees.<sup>29</sup> However, that information is based on the 1994 Employment Report. Since issuing the *Notice*, the Commission has released its 1995 Report, which shows that raising the annual reporting threshold to 15 employees would affect 2,778 stations, accounting for 16.8 percent of the employees at stations now subject to the requirements (25,792 of 153,058 employees). By raising the threshold to 20 employees, the Commission would add 10,037 employees at 1,838 stations. Thus, if the Commission were to raise the threshold for reporting to 20 stations or fewer, it would lift the burden from 4,616 stations currently subject to reporting, but affect only 23.7 percent of employees at stations subject to reporting.

The *Notice* also expresses concern that raising the threshold could run afoul of the decision in *Office of Communications of the United Church of Christ v. FCC*.<sup>30</sup> There, the Second Circuit overturned the Commission's earlier attempt to raise the threshold from five fulltime employees to ten, finding that Commission action to be arbitrary and capricious. However, there are marked distinctions between the circumstances that existed in 1977 and those of 1996. In the 1970s, the Commission had based its action on four grounds: (1) inadequate Commission resources to handle the paperwork generated by the reporting requirements; (2) the

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<sup>29</sup> We agree with the assessment contained at ¶ 28 of the *Notice* that the Commission should not adopt the definition of "small business" that has been established by the Small Business Administration. We also believe that the Commission need not concern itself with the provisions of 15 U.S.C. § 632(a) since the Commission is not prescribing a small business size standard, but rather is merely delineating a threshold for its EEO reporting requirements.

<sup>30</sup> 560 F.2d 529 (2nd Cir. 1977)